88-1682

NO. 88-

Supreme Court, U.S.
FILED
MAR 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the

Supreme Court of the United States

October Term, 1988

DONALD A. BREMNER,
DOROTHY G. BREMNER,
KATHLEEN M. FISCHEL,
CORINNE C. STRAUSER,

Petitioners

v.

HAWAII HOUSING AUTHORITY,
State of Hawaii and its
Designee Arbitrator,
WENDELL H. MARTIN,
KALAMA LAND COMPANY, LTD.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT, STATE OF HAWAII (CIVIL)

(NO. 12471)

c/o Donald A. Bremner
348 Dune Circle
Kailua, Hawaii 96734
(808) 261-2494: pro se

MARCH 1989

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

PETITION FOR WRIT OF CERTIORARI

a. Questions Presented:

1. Were Appellant's existing residential lease contracts impaired under Article I, Section 10 of the Constitution of the United States by the action of a state arbitrator acting under Hawaii Revised Statutes (HRS) Section 519-2, when he awarded two 15-year term rents instead of one rent for the remaining 30-year term of the leases?

2. Did the Supreme Court of the State of Hawaii err when it denied Appellant's appeal, based on the above constitutional issue, on procedural grounds in contradiction to its established precedent thereby preventing adjudication of the above-referenced constitutional issue?

b. Parties to the Proceedings:

All parties to these proceedings are contained in the caption of the case as listed on the cover sheet of this document.

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TABLE OF AUTHORITIES

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Rules of the Supreme Court

d. Prior Administrative and Court Judgements:

1. On February 26, 1987, the State's arbitrator rendered his awards in subject case setting two fifteen-year term lease rents for lessees-appellants as follows:

Bremner

For the 15-year period commencing July 1, 1979	$4300
For the 15-year period commencing July 1, 1994	$6500

Fischel

For the 15-year period commencing January 1, 1982	$5700
For the 15-year period commencing January 1, 1997	$8600

Strauser

For the 15-year period commencing August 1, 1984	$6300
For the 15-year period commencing August 1, 1999	$9500

2. On May 7, 1987 (entered May 11), Hawaii State Circuit Court Judge Richard Y. C. Au refused to dismiss Appellant's appeal construing it to be a Motion to Modify, Correct or Vacate Arbitration Awards under HRS 658 and allowed ten days in which to join Kalama Land Company, Ltd. as a party. (Appendix, A-1)

3. On September 16, 1987 (entered October 7, 1987), Hawaii State Circuit Court Judge Simeon R. Acoba denied Appellant's Motion to Modify, Correct or Vacate Arbitration Awards and granted Kalama Land Company's Motion to Confirm the Arbitration Awards. (Appendix, A-2)

4. On July 8, 1988, the Supreme Court of the State of Hawaii denied Appellee Kalama's Motion to Dismiss the Appeal for Lack of Jurisdiction claiming that Appellant's initial circuit court appeal had been a mistaken label of complaint and had failed to join Ka-

lama as a party. (Appendix, A-4)

5. On October 19, 1988 (entered December 9, 1988), the Supreme Court, State of Hawaii, denied Appellant's appeal on the same procedural grounds as contained in Appellee Kalama's Motion to Dismiss for Lack of Jurisdiction referenced above. (Appendix, A-5)

e. Grounds for Jurisdiction:

This is a civil proceeding arising from a statutorily mandated residential lease rent arbitration under HRS 519-2 (1975); a subsequent confirmation of the arbitration awards by the first circuit court of the State of Hawaii and a denial of an appeal of that decision by the Supreme Court of the State of Hawaii on procedural grounds. The order denying Appellant's appeal was entered in the Hawaii Supreme Court on December 9, 1988.

This appeal is brought pursuant to USC Title 28, Section 1257(a), and Section 2101(c)

allowing a review of a decision by the State Supreme Court involving a constitutional issue.

f. Constitutional Provisions Involved:

The action of the State's designated Arbitrator, acting under State law (HRS 519-2) in establishing two lease rents instead of one for the remaining term of the lease substantially impaired the existing lease contracts between the subject lessees and the lessor in violation of Article I, Section 10 of the Constitution of the United States, prohibiting contracts from being impaired by state laws.

g. Statement of the Case:

Lessee-Appellants live on lease-hold land, under lease arrangements which are contained in contracts between the lessor, Kalama Land Company, Ltd. and Donald and Dorothy Bremner; Kalama Land Co. and Kathleen M. Fischel; and Kalama Land Co. and Corinne C.

Strauser on three separate parcels. Strauser's lease was assigned to her in 1959; Fischel's in 1963 and the Bremners' in 1969.

On June 3, 1986, the lessor, Kalama Land Co. called for lease rent renegotiations in accordance with existing agreements. On July 29, 1986, claiming an impasse in negotiations (despite the fact that some were not begun), the lessor invoked arbitration under a state law (HRS 519-2) controlling certain leases.

On February 26, 1987, a single arbitrator acting as a state designee, rendered his award setting two 15-year term lease rents in stepped-up values instead of one rent for the remaining 30-year term of the leases. The matter of multiple or stepped-up lease rents was not a matter that had been submitted to the arbitrator.

The arbitrator's award was appealed to the Circuit Court of the State of Hawaii pursuant to HRS 519-2 and HRS 658. A Motion for

Dismissal of the appeal on the basis that it was a mistaken label of complaint and that it failed to join the Kalama Land Company, Ltd. was denied on the ground that non-joinder of a party in the State of Hawaii is not ground for dismissal of an appeal. In addition the court allowed ten days in which to join Kalama as a party. Subsequently the constitutional issue involved in the case was stated in pleadings submitted to the court some 44 days prior to the hearing as well as argued before the court at the hearing.

The Circuit Court upheld the arbitrator's awards on the basis that the power of an arbitrator is broad and discretionary.

The Circuit Court judgement was appealed to the Hawaii Supreme Court on the strength that the Circuit Court erred in finding that the arbitrator's power goes beyond that prescribed by the parties in contracting for his

services and failed to consider the constitutional issues involved. These same constitutional issues were addressed to the Hawaii Supreme Court in Appellant's opening brief April 4, 1988.

On June 23, 1988, Appellee Kalama Land Co. filed a Motion to Dismiss the Appeal before the Hawaii Supreme Court for Lack of Jurisdiction, claiming the initial Circuit Court appeal was a mistaken label of complaint and that the non-joinder of Kalama in that initial appeal was a ground for dismissal. On July 8, 1988 the Motion was denied by the Hawaii Supreme Court. (Appendix, A-4)

However, on October 19, 1988 the Hawaii Supreme Court in a Memorandum Opinion, denied Appellant's appeal on the same procedural grounds as proffered by Kalama Land Co. in the above-referenced Motion to Dismiss for Lack of Jurisdiction. The Judgement of the Hawaii Supreme Court was entered on December 9, 1988.

h. Reasons Dictating Review:

The questions presented - concerning a basic constitutional violation - have never been addressed and therefore never adjudicated. The result of this is to relegate Appellants to suffer a possible impairment of their lease contracts for the next 23-30 years.

i. Not applicable because this appeal is not from a Federal District Court.

j. Argument:

The Arbitrator, acting under the mantle of state law, exceeded his authority and impaired the existing lease contracts of petitioners when he set more than one lease rent for the remaining term of subject leases. The applicable provisions of subject leases state:

> TO HAVE AND TO HOLD the above mentioned premises with the rights, privileges and appurtenances to the same belonging to or appertaining unto said lessee for the term of fifty-five (55) years commencing with the (date): the lessee

> yielding and paying _____per annum for the first twenty five years of said term and for and during the remaining thirty years of said term, such annual rent as shall be mutually agreed upon by the lessor and the lessee, or in the event of failure to reach agreement prior to ninety (90) days before the end of the first twenty-five year period, such net annual rent as shall be determined by arbitration . . .

The interpretation of this language has been addressed by Hawaii's courts. In a 1978 Declaratory Judgement (Midkiff, et al. v. Amemiya, et al., Civil #47103) HLR 78-59, the court found that the same language in existing B. P. Bishop Estate leases required the setting of one lease rent for the entire remaining term (30 years) of the lease, and that the 15-year reference in Act 185 (HRS 519-2) had no effect on that requirement. The court said,

> The tract A form of lease at issue in this case fixes the rent for an initial period of 25 years and then for the remaining 30 years at an amount to be renegotiated between the parties. Since the rent is fixed on renegotiation for the remaining 30 years of the lease, the fifteen year limitation provision in Act 185 has no effect on this lease.

The contract for arbitration services did not authorize or stipulate any different approach to setting a rent than that contained in the leases themselves. The applicable provision reads:

> ARBITRATOR shall determine and make an award of the lease rent payable to Lessor for the properties identified in the leases attached hereto as Exhibits B through D in compliance with any stipulations by the parties involved, Section 519-2 HRS as well as the applicable provisions of Chapter 658 HRS and Chapter 17-542, Hawaii Administrative Rules.

HRS 519-2 (Appendix, A-7) covers applicability as follows:

> All leases as defined by Sec. 516-1(5) of residential lots, as defined by Sec. 516-1(11), existing on June 2, 1975, or entered into thereafter, which provide the following, or in the case of leases existing on June 2, 1975 shall be construed in conformity with the following:

Subject leases validly existed prior to June 2, 1975 and cannot be altered by this statute or by any action under the guise of this state law. The arbitrator claimed no other authority which would allow him to

award more than one lease rent for the remaining term of the leases. Under an attempted deposition he was asked:

> Q. What authority did you use to do that? (set two lease rents)
> A. The authority . . . the lease indicated that the lease rent was to be set for the next thirty years.
> Q. Yes it did.
> A. That's the authority I used.

The issue was again argued at trial:

> Q. Did you in the course of pursuing this particular question review our lease documents?
> A. (Arbitrator) Yes sir.
> Q. Did you find any authority in these to allow for the setting of two lease rents instead of one for the remaining period?
> A. The lease says specifically that the annual rent is to be set for the final 30-year period.
> Q. Yes it does. What caused you to believe that the statute then superseded the lease documents, a contract between private parties? (Transcript of trial testimony)

An objection to this inquiry was then sustained by the court. The arbitrator's understanding of the contract for arbitration services was pursued next:

A. (Arbitrator) In the contract for service, the question, is it stated that a step-up rent is to be provided?
Q. Was in issue, yes?
A. Was in issue?
Q. Yes.
A. A step-up rent was in issue, no. The rent was the issue.
Q. Singular rent?
A. The only rent for the property for the next 30 years.
(Transcript of trial testimony)

The court verified its understanding of this testimony for in subsequently sustaining an objection said:

> I'll sustain the objection. He's testified to there was nothing in the contract relating to step-up rents.

With the lease documents and the contract for his services dispensed with as sources of authority for his multiple rent awards, the arbitrator turned to the statute as his source:

Q. Did you use any existing authority that you can tell us about to set this step-up lease rent?
A. The statute 516(519) indicates that minimum rent periods are 15 years in length, a minimum of 15 years.
Q. Do you have a copy of the statute?

A. Not with me. But I believe it refers to 15-year increments which talks about the rent itself of a minimum requirement that you cannot set the rent for any less than 15 years.

Q. I think the provision you're referring to is 519-1 which is on the top of that page. And I will let you look at it and then ask you to read what it says.

A. It says quote, "such renegotiation shall not be exceeded more frequently than once every 15 years, provided that the first of such reopenings shall not be scheduled prior to the fifteenth year following the initial date of the lease."

Q. And the key word, from what I hear, is renegotiation and you didn't set a renegotiation. You set a lease rent.

A. Yes sir.

Q. But that's not the authority you used?

A. Well, that is something in the statute which led you to believe, in my opinion, I could set up a step-up as I was setting the rent for the 30-year period.

Further:

Q. To your knowledge, Mr. Martin, are there any other provisions in that statute that would apply to this particular question of whether or not our leases are subject to the standard of a renegotiation every 15 years?

A. No sir, there's nothing in here that says it couldn't be set for the 15-year period.

Q. Are you sure about that?
A. Yes sir. That was my interpretation of the statute.
(Transcript of trial testimony)

If the arbitrator is correct that the statute gave him the authority to set multiple lease rents in contradiction to the existing lease contracts, then a state law has acted to substantially impair them. If he is incorrect, then he, acting as an arm of the state government under the statute (HRS 519-2) has perpetrated an impairment of petitioner's contracts through a misconception of the law. In so doing, the arbitrator acted on a matter not submitted to him in contravention of HRS 658-10 and prevailing case law covering arbitrations:

> A mistake or error of fact or law which is so gross and palpable as to be evidence of misconduct or undue partiality may however be a ground for impeachment, as may be a misconception of law which is so perverse as to work manifest injustice (6 Corpus Juris Secondum 154, p-412). See also Matter of Wilkens, 169 NR 9462 Beaufort Concrete Co. v. Atlantic States Const. Co. 352 F2d 460.

Further testimony of the arbitrator at trial confirmed that the matter of multiple lease rents was not submitted to him by the parties:

> Q. Who submitted the issue of two lease rents to you then?
> A. There was no submission of two lease rents to me.
> Q. Did the lessees ever agree to, or in any way indicate to you that you were to consider a two-step lease rent?
> A. No sir.
> (Transcript of trial testimony)

Hawaii law holds that, "An award not within the terms of submission will be set aside," Notely v. Davies, 5 Haw 43; See also, Communications Equipment Workers Union v. Western Electric, 320 F Supp 1277; Shahmoon Industries Inc. v. United Steel Workers of America, 263 F Supp 60.

That the lease contracts of petitioners have been impaired to the detriment of petitioners because of, or under the guise of, state law is clear. That the Hawaii courts have chosen not to adjudicate this issue threatens to relegate petitioners to suffer

this impairment in perpetuity for the remaining terms of their leases (23-30 years). Under the terms of Article I, Sec. 10 of the Constitution of the United States prohibiting such contract impairment by state law, the issue commands review and redress by the Supreme Court of the United States.

In addition, the Hawaii Supreme Court's refusal to address the subject case on its merits thereby leaving the constitutional issue without adjudication is contrary to the policy of that court and the precedents in similar situations established by its case histories.

First the Hawaii Supreme Court stated in its Memorandum Opinion of October 19, 1988 that "the record is devoid of any certificate of service on Kalama Land Company, Ltd." (the lessor) Such certificate of service was indeed contained in the record that the court had before it, having been served on the Ka-

lama Land Co. on May 19, 1988 with the Second Motion to Vacate, Modify or Correct Arbitration Awards which was made in accordance with Judge Richard Y. C. Au's ruling in the lower court to remedy the initial non-joinder of Kalama Land Co. (Appendix, A-1)

Rule 21 of the Hawaii Rules of Civil Procedure states:

> Rule 21: Misjoinder and Non-Joinder of Parties. Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms that are just. Any claim against a party may be severed and proceeded with separately by order of the court.

If non-joinder of a party is not a ground for dismissal of an action then the time granted by the court to effect the joinder cannot be, or act to be, a ground for dismissal of an action. Extensive Hawaii case law forms the foundation of this rule. In Marsland v. Pang, 5 Haw App 463; 701 P2d 175, the Hawaii Supreme Court holds that:

> Failure to name a real party in interest in complaint is not a ground for dismissal.

In McCandless v. Carter, 18 Haw 218, the court finds that lack of notice to the opposite party does not affect the jurisdiction of the trial judge to allow an appeal. In Midkiff v. Kobayashi 54 Haw 299; 507 P2d 724 the Hawaii Supreme Court rules that:

> Even if a circuit court ruling on the matter of indipensable party was erroneous, reversal was not required where there was important issue on appeal.

In In Re Eric G., 65 Haw 219, the Hawaii Supreme Court reverses a lower court's dismissal of a "mistaken label" of complaint with the following reasoning:

> The mistaken label of complaint as a Notice of Appeal and the mistaken reliance on Chapter 91, HRS by the Appellant do not vitiate the clear statement in the Notice of Appeal that the proceedings were based, in part, at least, on 20 USC 141. Substance controls over form. A claim for relief was stated and thus dismissal was erroneous.

This case is almost directly on target

with the facts in subject case since it was a "mistaken label of complaint" that caused the non-joinder of Kalama Land Co. but a proper claim for relief was stated and the proper statute cited in a timely manner under a Notice of Appeal. This case law has established the precedent of the Hawaii Supreme Court to allow substance to control over form and to allow appeals to be adjudicated on their merits. The precedent has advanced to the point where it is stated as a "policy" by the court. See Montalvo v. Chang, 64 Haw 345; 641 P2d 1321, and Jordan v. Hamada, 63 Haw 444, wherein it is stated that:

> The policy of the Supreme Court is to permit litigants, where possible, to appeal and to hear a cause on its merits.

The action of the Hawaii Supreme Court in subject case is contrary to this policy and precedent and because of this contradiction, commands review by the Supreme Court of the United States.

Dated this 8TH day of MARCH 1989.

Donald A. Bremner, pro se
348 Dune Circle
Kailua, Hawaii 96734

Dorothy B. Bremner, pro se
348 Dune Circle
Kailua, Hawaii 96734

Kathleen M. Fischel, pro se
376 N. Kalaheo Ave.
Kailua, Hawaii 96734

Corinne C. Strauser, pro se
51 Kaumana Pl.
Kailua, Hawaii 96734

APPENDIX

Donald A. Bremner
348 Dune Circle
Kailua, Hawaii 96734
261-2494
Appearing pro se

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

DONALD A. BREMNER, DOROTHY G. BREMNER, KATHLEEN M. FISCHEL, CORINNE C. STRAUSER, Lessees, Appellants v. HAWAII HOUSING AUTHORITY, State of Hawaii, and its designee, Arbitrator WENDELL H. MARTIN, Appellees.	CIVIL NO.87-0799-03 ORDER RE: MOTION TO DISMISS NOTICE OF APPEAL

ORDER RE: MOTION TO DISMISS NOTICE OF APPEAL

Appellees' Motion to Dismiss Notice of Appeal, having come on for hearing before the Honorable Richard Y. C. Au on Friday April 24, 1987 at 2:30 P. M., Colleen H. Sakurai appearing on behalf of Appellees and Donald A Bremner appearing on behalf of

Appellants, and this Court having heard the arguments of the parties, reviewed the memoranda and the records and files herein:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Appellant Donald A. Bremner will be allowed to proceed on his and his wife's, Appellant Dorothy G. Bremner, behalf in this and future proceedings. Appellant Donald A. Bremner will not be allowed to represent Appellants Kathleen M. Fischel and/or Corinne C. Strauser.

2. For purposes of this proceeding, Appellants Kathleen M. Fischel and Corrine C. Strauser shall be treated as if they proceeded pro se.

3. The Kalama Land Company, Ltd. shall be added to the action as a party defendant, Appellee.

4. The Appellants will be allowed to

amend their pleadings and file a separate Motion to Vacate, Modify, Correct or Stay the Arbitration Awards. This Court, sua sponte, further orders, adjudges and decrees that:

a. The time in which Appellants may file a Motion to Vacate, Modify, Correct or Stay the Arbitration Awards shall be extended from the date of the award until ten days after the entry of this order. This extension of time shall apply to all above-named Appellants.

5. Appellees Wendell H. Martin and The Hawaii Housing Authority may be dropped from this proceeding upon the presentation of a proper motion by any party following the receipt of the Appellants amended pleadings.

On all other issues, the matter is continued until amended pleadings have been served by the Appellants and an answer ac-

complished.

DATED: Honolulu, Hawaii, May 7, 1987

/S/ R. Y. C. Au
JUDGE OF THE ABOVE ENTITLED COURT

Of Counsel:
ASHFORD & WRISTON

ROSEMARY T. FAZIO 2228-0
LORRIN B. HIRANO 3685-0
235 Queen Street, 6th Floor
P. O. Box 131
Honolulu, Hawaii 96810
Telephone No. 524-4787

Attorneys for Lessor-Appellee
KALAMA LAND COMPANY, LTD.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

DONALD A. BREMNER, DOROTHY G. BREMNER, KATHLEEN M. FISCHEL, CORINNE C. STRAUSER, Lessees, Appellants, vs. HAWAII HOUSING AUTHORITY, State of Hawaii, and its designee, Arbitrator WENDELL H. MARTIN, KALAMA LAND COMPANY, LTD. Appellees.	CIVIL NO.87-0799-03 ORDER DENYING SECOND MOTION TO VACATE, MODIFY OR CORRECT ARBITRATION AWARDS Hearing Date: September 16, 1987 Hearing Time: 9:00 a.m. Judge: Honorable Simeon R. Acoba

ORDER DENYING SECOND MOTION TO VACATE, MODIFY OR CORRECT ARBITRATION AWARDS

This matter having come on for hearing on September 16, 1987 at 9:00 a.m. before

the Honorable Simeon R. Acoba; Colleen Sakurai, Esq. having appeared for the Hawaii Housing Authority, Lorrin B. Hirano, Esq. having appeared for the Kalama Land Co., Ltd., Donald A. Bremner having appeared pro se and for Dorothy Bremner, Corinne Strauser having appeared pro se, and Kathleen Fischel having appeared pro se; the Court having reviewed the Motion, memoranda, affidavits, and exhibits filed herein, having heard testimony of Wendell Martin, being fully advised in the premises and good cause appearing therefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Donald A. Bremner's, Dorothy Bremner's, Corinne Strauser's, and Kathleen Fischel's Second Motion to Vacate, Modify or Correct Arbitration Awards is denied.

DATED: Honolulu, Hawaii; Oct 6, 1987.

/S/ Simeon R. Acoba, Jr.
Judge of the above-entitled Court

Of Counsel:
ASHFORD & WRISTON

ROSEMARY T. FAZIO 2228-0
LORRIN B. HIRANO 3685-0
235 Queen Street, 6th Floor
P. O. Box 131
Honolulu, Hawaii 96810
Telephone No. 524-4787

Attorneys for Lessor-Appellee
KALAMA LAND COMPANY, LTD.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

DONALD A. BREMNER, DOROTHY G. BREMNER, KATHLEEN M. FISCHEL, CORINNE C. STRAUSER, Lessees, Appellants, vs. HAWAII HOUSING AUTHORITY, State of Hawaii, and its designee, Arbitrator WENDELL H. MARTIN, KALAMA LAND COMPANY, LTD. Appellees.	CIVIL NO.87-0799-03 ORDER GRANTING KALAMA LAND CO., LTD'S MOTION TO CONFIRM ARBITRATION AWARDS AND HAWAII HOUSING AUTHORITY'S JOINDER IN MOTION TO CONFIRM ARBITRATION AWARDS Hearing Date: September 16, 1987 Hearing Time: 9:00 a.m. Judge: Honorable Simeon R. Acoba

ORDER GRANTING KALAMA LAND CO., LTD.'S MOTION TO CONFIRM ARBITRATION AWARDS AND HAWAII HOUSING AUTHORITY'S JOINDER IN MOTION TO CONFIRM ARBITRATION AWARDS

This matter having come on for hearing

on September 16, 1987 at 9:00 a.m. before the Honorable Simeon R. Acoba; Colleen Sakurai, Esq. having appeared for the Hawaii Housing Authority, Lorrin B. Hirano, Esq. having appeared for the Kalama Land Co., Ltd., Donald A. Bremner having appeared pro se and for Dorothy Bremner, Corinne Strauser having appeared pro se, and Kathleen Fischel having appeared pro se; the Court having reviewed the Motion, memoranda, affidavits, and exhibits filed herein, having heard testimony of Wendell Martin, being fully advised in the premises and good cause appearing therefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Kalama Land Co. Ltd.'s Motion to Confirm Arbitration Award and the Hawaii Housing Authority's Joinder in Kalama Land Co. Ltd.'s Motion to Confirm Arbitration Award are granted, and the Arbitration Awards dated February 26, 1987 as to the annual rents for the lots designated as TMK Nos.

4-3-17-08, 4-3-17-42 and 4-3-15-33 are hereby confirmed.

DATED; Honolulu, Hawaii; Oct 6, 1987

/S/ Simeon R. Acoba, Jr.

NO. 12471

IN THE SUPREME COURT OF THE STATE OF HAWAII

DONALD A. BREMNER, et al., Appellants-Appellants, vs. KALAMA LAND COMPANY, LTD., Appellee-Appellant, and HAWAII HOUSING AUTHORITY, State of Hawaii, and its designee, Arbitrator WENDELL H. MARTIN, Appellees-Appellees.	CIV. NO.87-0799-03

ORDER

Upon consideration of the Motion to Dismiss Appeal for Lack of Jurisdiction, and the papers in support thereof,

IT IS HEREBY ORDERED that the motion is denied.

DATED: Honolulu, Hawaii, July 8, 1988

FOR THE COURT:
/S/ H. Lum
Chief Justice

NO. 12471

IN THE SUPREME COURT OF THE STATE OF HAWAII

DONALD A. BREMNER, DOROTHY G. BREMNER, KATHLEEN M. FISCHEL, and CORINNE C. STRAUSER, Appellants-Appellants, vs. HAWAII HOUSING AUTHORITY (State of Hawaii) and its designee, Arbitrator WENDELL H. MARTIN, KALAMA LAND CO., LTD., Appellees-Appellees.	) CIVIL NO.87-0799)) APPEAL FROM THE ORDER GRANTING KALAMA LAND CO. LTD.'S MOTION TO CONFIRM ARBITRATION AWARDS AND HAWAII HOUSING AUTHORITY JOIN IN MOTION TO CONFIRM ARBITRATION AWARDS; AND ORDER DENYING SECOND MOTION TO VACATE, MODIFY OR CORRECT ARBITRATION AWARDS, FILED OCTOBER 7, 1987

FIRST CIRCUIT COURT

HONORABLE SIMEON R. ACOBA, JR.
HONORABLE ROBERT G. KLEIN
HONORABLE RICHARD Y.C. AU
Judges

MEMORANDUM OPINION

This is an appeal from a circuit court refusal to vacate an arbitration award. The arbitration in question was conducted under the provisions of HRS 519-2 and an agreement executed between the parties to the arbitra-

tion and the arbitrator. Since the arbitration was based on an agreement, the provisions of HRS Chapter 658 apply. An order confirming the arbitration award entered on October 7, 1987 and thus the refusal to vacate the award is appealable. Salud v. Financial Security Insurance Co., 69 Haw.Adv. 437, 745 P 2d 290 (1987).

However, HRS 658-11 provides that notice of a motion to vacate, modify or correct an award shall be served on the adverse party within 10 days after the award is made and served. In this case, appellants filed a document entitled "Notice of Appeal to Circuit Court" and designated as appellees the Hawaii Housing Authority and the arbitrator rather than the opposing party in the arbitration, the Kalama Land Company, Ltd. Only the designated appellees were served within 10 days after the award. Appellees moved to dismiss the appeal. On May 11, 1987, over

two months after the notice, the circuit judge entered an order adding Kalama Land Company, Ltd., as a party to the appeal. The record is devoid of any certificate of service on Kalama Land Company, Ltd. On July 24, 1987, Kalama Land Company moved to confirm the award and that order was granted October 7, 1987.

Since there was no compliance with the clear requirements of HRS 658-11, the circuit court could not vacate the arbitration award, and had no option but to confirm the award when requested. Moreoever, on the record, there clearly were no grounds to vacate or modify the award. Affirmed.

DATED: Honolulu, Hawaii, October 19, 1988.

Donald A. Bremner,
Dorothy G. Bremner,
Kathleen M. Fischel,
Corinne C. Strauser
on the briefs, appellants pro se

/S/H. Lum
/S/Edward A. Nakamura
/S/F. Padgett
/S/Yoshimi Hayashi
/S/J. Wakatsuki

Colleen H. Sakurai
(Koshiba & Young) on
brief for appellee
Hawaii Housing Authority

NO. 12471

IN THE SUPREME COURT OF THE STATE OF HAWAII

DONALD A. BREMNER, DOROTHY G. BREMNER, KATHLEEN M. FISCHEL, and CORINNE C. STRAUSER, Appellants, vs. HAWAII HOUSING AUTHORITY, State of Hawaii and its Designee, Arbitrator WENDELL H. MARTIN, KALAMA LAND CO., LTD., Appellees.	) CIVIL NO.87-0799

JUDGMENT ON APPEAL

Pursuant to the Memorandum Opinion of the Supreme Court of the State of Hawaii entered herein on October 19, 1988, the Order confirming the arbitration award entered on October 7, 1987, is affirmed.

DATED; Honolulu, Hawaii: Dec 9, 1988

BY THE COURT:

APPROVED: /S/Sandra N. Yasui
OF CLERK

/S/Frank D. Padgett
JUSTICE OF THE ABOVE-ENTITLED COURT

CHAPTER 519
REAL PROPERTY LEASES

SECTION

519-2 Residential Leases of Real Property

519-2 Residential leases of real property. (a) All leases as defined by section 516-1(5), of residential lots, as defined by section 516-1(11), existing on June 2, 1975, or entered into thereafter, which provide for reopening of the contract for renegotiation of lease rent terms shall in the case of leases after June 2, 1975, provide the following, or in case of leases existing on June 2, 1975, shall be construed in conformity with the following:

(1) Such renegotiations shall not be scheduled more frequently than once every fifteen years, provided the first of such reopenings shall not be scheduled prior to the fifteenth year following the initial date of the lease; and

(2) Upon renegotiation, the lease rent payable shall not exceed the amount derived by multiplying the "owner's basis" by four per cent. For purposes of this section, "owner's basis" means the current fair market value of the lot, excluding onsite improvements, valued as if the fee title were unencumbered; less the lessee's share, if any, of the current replacement cost of providing existing offsite improvements attributable to the land, which replacement cost shall include an overhead

and profit not exceeding twenty per cent of the current replacement cost of the existing offsite improvements, or less the original lot development credit to the lessee, whichever is greater. For purposes of this section, "offsite improvements" means all physical improvements such as, but not limited to, roads, sewer lines, sewage treatment plants, and underground utility cables, constructed or placed in a subdivision or development off the land intended for occupancy, which improvements are to be used in common by occupants of all lands adjoining such improvements or by occupants of all lands for whose benefit the improvements have been constructed or placed; and "onsite improvements" means all physical improvements placed on a residential lot intended for occupancy which improvements are for the benefit of occupants of that lot, including but not limited to, dwelling units, garages, service buildings, stairs, walkways, driveways, walls, trees, shrubs, landscaping, and pools.

(b) In the event the parties to a lease are unable to achieve an agreement under any reopening provision, the Hawaii housing authority or its designess shall arbitrate, and its findings shall be binding and conclusive on both parties. Arbitration proceedings under this subsection will be subject to the following requirements:

(1) An advance deposit, which amount shall be determined by the authority, equal to projected expenses and fees of the authority or its designee for arbitration proceedings shall be required and shall be paid equally by

lessees and lessors. All additional expenses and fees incurred by the authority or its designee while acting as the arbitrator shall be borne equally by lessees and lessors. These additional expenses and fees shall be subject to monthly billings or other arrangements which may be specified by contract. If more than one lessee is involved in an arbitration proceeding, all lessees shall share equally in one-half of the arbitration costs. The same division of costs shall apply if more than one lessor is involved in a proceeding.

(2) Failure on the part of lessees to comply with the provisions set forth in this subsection, including failure to make advance deposits or payments, shall result in forfeiture of any rights or remedies under this chapter for arbitration, and the lessees' sole rights and remedies shall be as provided in the lease document.

(3) If lessors fail to comply with the provisions of this subsection, including failure to make advance deposits or payments, then arbitration proceedings under this chapter will cease and the lease rent shall be set at the most recent fixed lease rent. Upon compliance with the provisions of this chapter, the arbitration may proceed, with the determination of the new lease rent effective only from the date of compliance by the lessor.

(4) Except as provided in paragraphs (b)(2) and (b)(3) above, all new lease rents shall be effective as of the

date of reopening.

For the purpose of this subsection, "arbitration proceedings" means the actual arbitration conducted by the authority or its designee pursuant to a contract executed by and among the lessees, lessor, and the arbitrator detailing among other things, the following: description of properties involved, time of performance, compensation, method of payment, settlement and other procedures, and termination.

(c) Any covenant or provision of a lease in violation of this section, shall not be enforceable in any court in this State.

(d) For the purpose of this section renegotiation shall not include negotiation for the determination of lease rental under section 516-66 arising out of an extension under section 516-65. [L 1975, c 185, 2(2); am L 1976, c 242, 5; am L 1979, c 105, 49; am L 1984, c 191, 1]

88-1682

No. 88-_____

Supreme Court, U.S.
FILED
APR 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the

Supreme Court Of The United States

October Term, 1988

DONALD A. BREMNER,
DOROTHY G. BREMNER,
KATHLEEN M. FISCHEL,
CORINNE C. STRAUSER,

Petitioners

v.

HAWAII HOUSING AUTHORITY,
STATE OF HAWAII and its
Designee Arbitrator,
WENDELL H. MARTIN,
KALAMA LAND COMPANY, LTD.

Respondents

On Writ of Certiorari to the Supreme Court of the State of Hawaii

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Rosemary T. Fazio
Ashford & Wriston
235 Queen Street
P. O. Box 131
Honolulu, Hawaii 96810
(808)524-4787

Counsel for Respondent
Kalama Land Company, Ltd.

No. 88-_____

In the

Supreme Court Of The United States

October Term, 1988

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Questions Presented

As the Court will discover when it compares the Petition For Writ Of Certiorari with the opinion of the Supreme Court of the State of Hawaii (set forth in the Appendix to the Petition, hereinafter cited as Petitioners' App.), the questions which Petitioners seek to present here do not pertain to the principal grounds upon which the Hawaii Supreme Court decided the case.

Respondent Kalama Land Company, Ltd. (hereinafter "Kalama") respectfully submits that the only questions properly before this Court are the following:

1. Whether Petitioners' failure timely to file their motion to vacate, modify or correct the arbitrator's award divested the state circuit court of jurisdiction, pursuant to the requirements of Hawaii Rev. Stat. §658-11?

2. Whether the Hawaii Supreme Court correctly found that no grounds existed to vacate, modify or correct the arbitrator's award, pursuant to the requirements of Hawaii Rev. Stat. §§658-9, 10?

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Grounds for Jurisdiction

Petitioners have failed to file this Petition within the jurisdictional time requirements. Sup. Ct. R. 20.3.

Petitioners seek review of an Opinion of the Hawaii Supreme Court which was entered on October 19, 1988. Pursuant to 28 U.S.C. §2101(c), Petitioners had within 90 days to file their Petition. The time for filing commenced to run, in this case, from the Order Denying Reconsideration. That Order was entered by the Hawaii Supreme Court on November 7, 1988. See Respondents' App., at 18.

The deadline for filing this Petition was February 6, 1989. Kalama was not served with the Petition until April 10, 1989.

Statement of Case

The alleged facts as stated in the Petition contain exaggerations and inaccuracies. Since those "facts" do not relate to the ground of the Hawaii Supreme Court decision, however, there is no good reason to go into detailed factual matters here.

Summary Of Argument

The decision of the Hawaii Supreme Court turned on Petitioners' failure to meet jurisdictional time requirements, in their appeal from the arbitrator's award. This ruling, only obliquely challenged by the Petition, was clearly correct.

Argument

I. Petitioners Failed Timely To File A Motion To Vacate, Modify Or Correct The Arbitration Awards Under Hawaii Rev. Stat. §658-11.

(A) Petitioners failed to comply with the ten-day limitation

The arbitration awards here at issue were rendered by Respondent Hawaii Housing Authority's ("HHA's") arbitrator-designee, Respondent Wendell H. Martin ("Martin"), on February 26, 1987. Petition for Writ, at page 4.

On March 10, 1987, Petitioners filed a "Notice of Appeal to Circuit Court." Kalama, however, was intentionally omitted as a party from this "appeal," and the "Notice" was never served on Kalama or Kalama's attorneys. See Notice of Appeal to Circuit Court (Respondent's App., at page 22) (containing no Certificate of Service). Kalama is the "adverse party" under Hawaii Rev. Stat. §658-11. Since no Motion under §658-11 was timely served, Petitioners cannot seek to vacate, modify or correct the

arbitration awards. Florasynth, Inc. v. Pickholz, 750 F.2d 171 (2nd Cir. 1984); Taylor v. Nelson, 788 F.2d 220 (4th Cir. 1986).

Hawaii Rev. Stat. §658-11 requires that:

> [a] notice of a motion to vacate, modify, or correct an award, shall be served, in the manner prescribed for service of notice of a motion in an action, upon the adverse party or the adverse party's attorney within ten days after the award is made and served. (Emphasis added).

The ten-day time limitation on service of a motion to vacate, modify, or correct an award is not only clear and unambiguous, it is also mandatory. By using the word "shall," the Hawaii legislature expressed its unequivocal intent that the time deadline be strictly enforced. Cf., Territory of Hawaii v. Fasi, 40 Hawaii 478, 484 (1954) (the Court held that the word "'shall' is as mandatory as The Ten Commandments"). In Schroud v. Van Argilis & Co., 34 Ill. Dec. 428, 398 N.E.2d 103 (Ill. App. 1979), the Illinois court held that a lower court cannot extend the Illinois

90-day statutory period within which to move to vacate an arbitration award. The Ninth Circuit Court of Appeals, in Fortune, Alsweet & Eldridge v. Daniel, 724 F.2d 1355 (9th Cir. 1983), also held that the time limit on a motion to vacate an award is a statute of limitation and therefore an untimely motion must be denied. Accord, Sheetmetal Workers, Loc. 252 v. Standard Sheet Metal, 699 F.2d 481 (9th Cir. 1983).

Similar and analogous language under the provisions of Rule 59 of the Hawaii and the Federal Rules of Civil Procedure has been interpreted to preclude an untimely motion for new trial or to amend a judgment. In Sutherland v. Fitzgerald, 291 F.2d 846 (10th Cir. 1961), the court held that a motion purportedly brought under Rule 59 was ineffective where it was filed, but not served, within ten days of the underlying judgment. See also, Peake v. First National Bank and Trust Company of Marquette, 717 F.2d 1016, 1019, fn. 5 (6th Cir. 1983) (although

the parties at oral argument focused on the date of filing, the court stated that "the critical date is the date of service"). The policy considerations are stronger here than in situations under Rule 59, since arbitration is meant to be a quick and efficient alternative to litigation.

Since Petitioners' March 10, 1987 "Notice of Appeal" was not timely served, Petitioners were rightly precluded from seeking to vacate, modify, or correct the arbitration awards under Hawaii Rev. Stat. §658-11.

(B) Hawaii Rev. Stat. §658-11 does not permit an extension of time to move to vacate, modify, or correct an arbitration award.

Petitioners contend that the Honorable Richard Y. C. Au, trial judge, properly extended the time for filing the motion to vacate the awards. Petition for Writ, at page 20. The statute of limitations is jurisdictional, however, a court cannot

extend the time deadline for filing a motion to vacate, modify or correct an award. Cf. Bacon v. Karlin, No. 11139, slip op. [68 Hawaii ___, 727 P.2d 1127] (November 18, 1986). In Bacon, appellant filed an ex parte motion for extension of time to file notice of appeal, after the permissible time set forth in Hawaii R. App. Pro. 4(a)(5). The Circuit Court granted the motion and attempted to extend the time for filing the appeal. The Hawaii Supreme Court, however, ruled that the trial court had no power to extend the time for filing a notice of appeal, since such an extension was not authorized by Hawaii R. App. P. 4(a)(5). Bacon, 68 Hawaii at ___, slip op. at 4-5.

In the instant case, Chapter 658 does not permit an extension of time to serve a motion to vacate, modify or correct an arbitration award. The trial court's Order was therefore ineffective to resurrect Petitioners' attempt to overturn the arbitration awards.

II. Denial Of This Writ Is Compelled By Public Policy In Favor Of Arbitration As An Efficient Alternative To Litigation.

Petitioners' further arguments in support of their defective attempt to "appeal" the awards are misplaced. Petitioners claim that they attempted to follow Hawaii R. Civ. P. 21, which prevents "misjoinder" from being a grounds for dismissal. Petition for Writ, at page 20. The Hawaii Rules of Civil Procedure, however, are expressly inapplicable to proceedings to vacate, modify, correct, or confirm arbitration awards under Hawaii Rev. Stat. Chapter 658. See Hawaii R. Civ. P. 81(a)(5). Consequently, the lower court had no grounds to permit Petitioners to file their "Second Motion To Vacate, Modify, or Correct Arbitration Awards." Kalama's Motion to Confirm Arbitration Awards was therefore properly granted and the Opinion of the Hawaii Supreme Court was properly decided.

A denial of this Petition is entirely consistent with sound public policy in favor of arbitration. It is also consistent with the Hawaii Supreme Court's recent ruling in Salud v. Financial Security Insurance Company, Ltd., No. 12178, slip op. [745 P.2d 290] (November 10, 1987). In Salud, the Court dismissed an appeal on the grounds that an order denying a motion to vacate an arbitration award was not a "final and appealable" order under Hawaii Rev. Stat. §658-15. The Court stated that the appropriate procedure would be for the unsuccessful movant to move to confirm the award, perfect the appeal, and obtain appellate review of the order confirming the award.

The court also recognized, however, that "one who seeks to vacate an award, . . . must do so within ten days after the award is made and served." Salud, slip op. at 4, 745 P.2d at 292. Salud thus contemplates that a

proper motion to vacate, modify, or correct an arbitration award has been brought. Here, no such motion was timely served. If Petitioners could urge the vacation, modification, or correction of the arbitration award--without having brought a timely motion to vacate, modify, or correct--the provisions of Hawaii Rev. Stat. §658-11 would be rendered a nullity. A party wishing to contest an arbitration award could then simply wait until a Motion to Confirm is filed. A reading of the statute that thus eliminates Hawaii Rev. Stat. §658-11 would be illogical.

In Gadd v. Kelly, 66 Hawaii 431, 441, 667 P.2d 251, 258 (1983), the Hawaii Supreme Court emphasized that "[there is a] legislative policy to encourage arbitration and thereby discourage litigation, [therefore] judicial review of an arbitration award is confined to the 'strictest possible limits' . . . "; Mars Constructors, Inc. v. Tropical

Enterprises Limited, 51 Hawaii 332, 336, 460 P.2d 317, 319 (1969). As the Pennsylvania court stated in Emporium Area Joint School Authority v. Anundson Construction and Building Supply Company, 402 Pa. 81, 166 A.2d 269, 270 (1961), "arbitration should be a quick and easy mode of obtaining justice." (Emphasis in original). Granting relief from a failure strictly to comply with the provisions of Hawaii Rev. Stat. Chapter 658 would undermine this policy favoring arbitration and discouraging litigation.

Conclusion

The points which Petitioners request this Court to review are not dispositive of the case. For that reason--and particularly because the Petition does not and cannot challenge the clearly correct ruling of the Hawaii Supreme Court--the Petition for Writ of Certiorari should be denied.

Dated this 25th day of April, 1989.

ROSEMARY T. FAZIO

Attorney for KALAMA LAND COMPANY, LTD., Respondent

APPENDIX

NO. 12471

IN THE SUPREME COURT OF THE STATE OF HAWAII

DONALD A. BREMNER, DOROTHY G. BREMNER, KATHLEEN M. FISCHEL, and CORINNE C. STRAUSER, Appellants-Appellants, vs. HAWAII HOUSING AUTHORITY (State of Hawaii) and its Designee, Arbitrator WENDELL H. MARTIN, KALAMA LAND CO., LTD., Appellees-Appellees.	CIVIL NO. 87-0799 MOTION FOR RECONSIDERATION

ORDER DENYING RECONSIDERATION

Upon consideration of Appellants' motion for reconsideration filed October 28, 1988 and the record,

IT IS HEREBY ORDERED that the motion is denied.

DATED: Honolulu, Hawaii; November 7, 1988.

Donald A. Bremner, Dorothy G. Bremner, Kathleen M. Fischel and Corinne C. Strauser, appellants pro se on the motion

CHAPTER 658

HAWAII REVISED STATUTES

ARBITRATION AND AWARDS

§658-8 Award; confirming award. The award shall be in writing and acknowledged or proved in like manner as a deed for the conveyance of real estate, and delivered to one of the parties or the party's attorney. A copy of the award shall be served by the arbitrators on each of the other parties to the arbitration, personally or by registered or certified mail. At any time within one year after the award is made and served, any party to the arbitration may apply to the circuit court specified in the agreement, or if none is specified, to the circuit court of the judicial circuit in which the arbitration was had, for an order confirming the award. Thereupon the court shall grant such an order, unless the award is vacated, modified, or corrected, as prescribed in sections 658-9 and 658-10. The record shall be filed with the motion as provided by section 658-13, and notice of the motion shall be served upon the adverse party, or the adverse party's attorney, as prescribed for service of notice of a motion in an action in the same court. [CC 1859, §932; RL 1925, §2931; am L 1925, c 276, pt of §1; RL 1945, §8708; am L 1949, c 347, §1; RL 1955, §188-8; HRS §658-8; am L 1972, c 90, §2(f); am imp L 1984, c 90, §1]

§658-9 Vacating award. In any of the following cases, the court may make an order vacating the award, upon the application of any party to the arbitration:

(1) Where the award was procured by corruption, fraud, or undue means;

(2) Where there was evident partiality or corruption in the arbitrators, or any of them;

(3) Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy; or of any other misbehavior, by which the rights of any party have been prejudiced;

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final, and definite award, upon the subject matter submitted, was not made.

Where an award is vacated and the time, within which the agreement required the award to be made, has not expired, the court may in its discretion direct a rehearing by the arbitrators. [CC 1859, §933; RL 1925, §2932; am L 1925, c 276, pt of §1; RL 1935, §4178; RL 1945, §8709; RL 1955, §188-9; HRS §658-9]

§658-10 Modifying or correcting award. In any of the following cases, the court may make an order modifying or correcting the award, upon the application of any party to the arbitration:

(1) Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing, or property, referred to in the award;

(2) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted;

(3) Where the award is imperfect in a matter of form, not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof, and promote justice between the parties. [CC 1859, §934; am L 1911, c 115, §1; RL 1925, §2933; am L 1925, c 276, pt of §1; RL 1935, §4179; RL 1945, §8710; RL 1955, 188-10; HRS §658-10]

§658-11 Notice of motion to vacate, modify, or correct; stay. Notice of a motion to vacate, modify, or correct an award, shall be served, in the manner prescribed for service of notice of a motion in an action, upon the adverse party or the adverse party's attorney within ten days after the award is made and served. For the purposes of the motion any judge who might make an order to stay the enforcement of a judgment, in an action brought in the same court, may make an order to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award. The record shall be filed with the motion as provided by section 658-13. [CC 1859, §935; RL 1925, §2934; am L 1925, c 276, pt of §1; RL 1935, §4180; RL 1945, §8711; RL 1955, §188-11; HRS §658-11; am L 1972, c 90, §2(g); am imp L 1984, c 90, §1]

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

DONALD A. BREMNER, DOROTHY G. BREMNER, KATHLEEN M. FISCHEL, and CORINNE C. STRAUSER, Lessees, Appellants v. HAWAII HOUSING AUTHORITY (State of Hawaii) and its designee, Arbitrator WENDELL H. MARTIN Appellees	CIVIL NO. 87-0799-03 NOTICE OF APPEAL TO CIRCUIT COURT: STATEMENT OF THE CASE: DESIGNATION OF RECORD ON APPEAL: ORDER FOR CERTIFICATION AND TRANSMISSION OF RECORD

NOTICE OF APPEAL TO CIRCUIT COURT

Notice is hereby given that DONALD A. BREMNER, DOROTHY G. BREMNER, KATHLEEN M. FISCHEL AND CORINNE C. STRAUSER, Appellants above named, pursuant to HRS Section 658-9 through 11, and Rule 72(a) of the Hawaii Rules of Civil Procedure, hereby appeal to the Circuit Court of the First Circuit from the decision of the HAWAII HOUSING AUTHORITY (State of Hawaii) and its designee,

Arbitrator WENDELL H. MARTIN rendering a residential lease-rent arbitration award on February 26, 1987 which was received by the above named lessee Appellants on February 28, March 2 and February 28, 1987 respectively.

DATED: Honolulu, Hawaii, March 10, 1987.

/s/ Donald A. Bremner
Donald A. Bremner, Appellant, lessee appearing for all named Appellants

/s/ Dorothy G. Bremner
Dorothy G. Bremner, Appellant lessee

/s/ Kathleen M. Fischel
Kathleen M. Fischel, Appellant lessee

/s/ Corinne C. Strauser
Corinne C. Strauser, Appellant lessee

Donald A. Bremner
348 Dune Circle
Kailua, Hawaii 96734
261-2494

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

DONALD A. BREMNER, DOROTHY G. BREMNER, KATHLEEN M. FISCHEL, and CORINNE C. STRAUSER, Lessees, Appellants v. HAWAII HOUSING AUTHORITY (State of Hawaii) and its designee, Arbitrator WENDELL H. MARTIN Appellees	CIVIL NO. 87-0799-03 : STATEMENT OF THE CASE

STATEMENT OF THE CASE

1. The award is arbitrary because it does not reflect valid evidence presented by the lessees. The result reflects evident partiality in favor of the lessor.

2. The Arbitrator exceeded his power and/or executed it imperfectly so as to produce an award which is not a mutual, equitable, definite and final product.

3. There are evident miscalculations of figures involved in the amount of the award since the amounts do not reflect the full import of the evidence.

4. The Arbitrator failed to provide any findings of fact or conclusions to justify the award and to corroborate that it was derived in an objective rather than an arbitrary manner. Appellants requests to the HAWAII HOUSING AUTHORITY to have such findings produced have been refused.

5. The Arbitrator has awarded on a matter not submitted to him outside of his authority and upon which there was no evidence introduced at the hearing to justify his determination. In so doing the Arbitrator has arbitrarily abrogated the contractual arrangements existing between the lessees and their lessor, the Kalama Land Company in valid lease documents.

The Appellants pray that these errors will be remedied by the Court by vacating, modifying or correcting the above-referenced Arbitrator's award rendered on February 26, 1987 involving the Appellant lessees.

Dated: Honolulu, Hawaii; March 10, 1987.

/s/ Donald A. Bremner
Donald A. Bremner,
Appellant, lessee
Appearing for all
Appellant, lessees

Donald A. Bremner
348 Dune Circle
Kailua, Hawaii 96734
261-2494

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

DONALD A. BREMNER, DOROTHY G. BREMNER, KATHLEEN M. FISCHEL, and CORINNE C. STRAUSER, Lessees, Appellants v. HAWAII HOUSING AUTHORITY (State of Hawaii) and its designee, Arbitrator WENDELL H. MARTIN Appellees	CIVIL NO. 87-0799-03 : DESIGNATION OF RECORD ON APPEAL

DESIGNATION OF RECORD ON APPEAL

Pursuant to Rule 72(d)(1), Hawaii Rules of Civil Procedure, Appellants above-named designates as the Record on Appel the entire record, as established and kept by WENDELL H. MARTIN, Arbitrator and designee of THE HAWAII HOUSING AUTHORITY, during the duration of the

Arbitration proceeding January 5, 1987 to February 26, 1987.

DATED: Honolulu, Hawaii, March 10, 1987.

/s/ Donald A. Bremner
Donald A. Bremner,
Appellant, lessee
Appearing for all the
Appellant, Lessees.

Donald A. Bremner
348 Dune Circle
Kailua, Hawaii 96734
261-2494

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

DONALD A. BREMNER, DOROTHY G. BREMNER, KATHLEEN M. FISCHEL, and CORINNE C. STRAUSER, Lessees, Appellants v. HAWAII HOUSING AUTHORITY (State of Hawaii) and its designee, Arbitrator WENDELL H. MARTIN Appellees	CIVIL NO. 87-0799-03 : ORDER FOR CERTIFICATION AND TRANSMISSION OF RECORD

ORDER FOR CERTIFICATION AND TRANSMISSION OF RECORD

TO: RUSSELL FUKUMOTO
Executive Director of
Hawaii Housing Authority
1002 North School Street
Honolulu, Hawaii 96817

and its designee, Arbitrator
WENDELL H. MARTIN
c/o 1067 Alakea Street, 2nd Floor
Honolulu, Hawaii 96813

YOU ARE HEREBY ORDERED:

To certify and transmit to this Court, within twenty (20) days of the date stamped below, or within such further time as may be allowed by the Court, the entire record in this proceeding, defined in H.R.S. §658-13 in the matter of the Arbitration award dated February 26, 1987 for above-named Appellants.

DATED: Honolulu, Hawaii; March 10, 1987.

/s/ H. Seto (Seal)
Clerk of the Above-Entitled Court

Supreme Court, U.S.
FILED
MAY 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1682

In the

Supreme Court of the United States

October Term, 1988

DONALD A. BREMNER,
DOROTHY G. BREMNER,
KATHLEEN M. FISCHEL,
CORINNE C. STRAUSER,

Petitioners

v.

HAWAII HOUSING AUTHORITY,
State of Hawaii and its
Designee Arbitrator,
WENDELL H. MARTIN,
KALAMA LAND COMPANY, LTD.

Respondents

PETITIONERS,

REPLY BRIEF

c/o Donald A. Bremner
348 Dune Circle
Kailua, Hawaii 96734
(808) 261-2494: pro se

MAY 1989

NO. 88-1682

IN THE SUPREME COURT OF THE UNITED STATES
October term , 1988

Petitioner's Reply Brief to Respondent
Kalama Land Co, Ltd.'s Brief in Opposition

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NO. 88-1682

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

Petitioner's Reply Brief to Respondent
Kalama Land Company, Ltd's Brief in Oppostion

a. Reply to Questions Presented:

Respondent's statement under this heading only serves to corroborate the fact that the Hawaii Supreme Court failed to address the Constitutional issues raised in subject case. Respondent's Brief does not address them either. The Hawaii court opted instead to stress "form" rather than "substance" in contravention of their established precedent and policy to do otherwise and to adjudicate important legal issues.

Manifest justice requires that some court in our country's judicial system address the question of an unconstitutional impairment of contracts at the hands of a State designated arbitrator under State law.

e. Reply to Grounds for Jurisdiction:

Respondents themselves were responsible for officially entering the decision of the Hawaii Supreme Court in the subject case(Judgement on Appeal - Appendix 6, Petitioner's Writ of Certiorari) on December 9, 1989.

USC Title 28-2101(c) states:

> Any other appeal or any writ of certiorari intended to bring any judgement or decree in a civil action or proceeding before the Supreme Court for review shall be taken or applied for within 90 days after the entry of such judgement or decree.

In Judicial proceedings in the State of Hawaii a Judgement is not rendered final and is not effective until it is entered. It is not entered until it is officially filed with the clerk of the court. In the words of Rule 58 of the Hawaii Rules of Civil Procedure, "The filing of the Judgement in the office of the clerk constitutes the entry of the Judgement and the Judgement is not effective before such entry." (emphasis added)

Rule 26 of the Hawaii Rules of

Appellate Procedure also states that,

"The filing of the Judgement constitutes entry of the Judgement."

See also, Naki v. Hawaiian Electric Co. , 50 Haw 85, wherein the court found that finality does not attach to Judgement until written order on the motion is filed. Time requirements for filing appeals in civil actions in the State run from the time of entry of the Judgement meaning the filing of the Judgement with the clerk of the court.

Petitioners relied on this Judicial practice and the meaning of the terms involved as defined and commonly used in the course of that practice.

Consequently, running from December 9,1988, the 90 days specified by USC 28-2101(c) expired at 12:01 am on March 10, 1989. Petitioner's application for Writ of Certiorari was postmarked and docketed on March 8, 1989 and therefore timely.

g. Reply to Statement of the Case:

Respondent's statement contained in this section of their Brief in opposition should be stricken as groundless.

j. Reply to Argument:

I. (A) Respondents assert that Petitioners failed to file a timely motion to vacate, modify or correct arbitration awards and failed to comply with the ten day time limit.

At no time in the court proceedings below did Petitioners fail to meet filing deadlines required by Hawaii Statutes or court rules. The arbitrator's decision was received by Petitioner's Bremner and Strauser on February 28,1987 and by Petitioner Fischel on March 2, 1987. On March 10,1987, within the 10 days required by HRS 658-11, Petitioners filed a Notice of Appeal citing HRS 658 as a foundation. This Notice of Appeal was construed by the court to be a Motion to Vacate, Modify or Correct

Arbitration Awards(See Petitioner's Writ of Certiorari - Appendix 1). Consequently, Respondent's claim that the appeal was not timely is erroneous.

(B) Contrary to Respondent's contention here also, Petitioners do not claim that Judge Richard Y. C. Au extended the time to file a motion to vacate the arbitration awards. Judge Au did not need to extend the time since the complaint was filed within the 10 day requirement.

In ruling on a motion to dismiss Petitioner's complaint because it failed to join the Kalama Land Company, Judge Au found that in accordance with court precedent and case law, misjoinder of a party was not ground for dismissal. Indeed this is the precedent and policy of the Hawaii Supreme Court(See Petitioner's Writ of Certiorari, Argument, pages 20-23).

Judge Au did order the Kalama Land Company to be joined and provided 10 days

in which to do so,(See Petitioner's Writ of Certiorari -Appendix 1).That requirement was timely met when Petitioners filed the Second Motion to Vacate, Modify or Correct Arbitration Awards on May 19,1987 within 10 days of the entry of Judge Au's order on May 11, 1987.The above motion was served on Kalama Land Company on May 19,1987. That service is part of the record and any statement or finding that Kalama was never served is just plain untrue. Consequently HRS 658 was complied with in this fashion.

Also if misjoinder cannot be ground for dismissal, then the time to remedy a misjoinder cannot be ground for dismissal.Where actual parties have actual notice of suit they suffer no predjudice from a technical defect(Jordan v. U. S., 694 F2d 837).

If, as Respondent argues, and the Hawaii Supreme Court opined, Petitioners are to be denied the applicability of

the rule of law that misjoinder is not ground for dismissal , then due process and equal protection under law for them is jeopardized also.

II. Contrary to Respondent's claim that the court's function is to uphold "public policy", Petitioners believe its function is to seek justice. Where the arbitration process has been abused and where it has been capricious and violated the constitutional rights of parties, the court is compelled to provide manifest justice.

Fortunately many courts are aware of the distinction between "policy" and justice holding on the general rule that,

> "..... arbitration of a dispute with finality placed on arbitration by a statute cannot be equated with a litigant's remedy at law for a wrong." (State v. Williams, 12 OR 133;505 P2d 936)

Respondents would have arbitration become a substitute for justice not a servant to it. The so-called policy needs up-dating

also. The cases cited by Respondent to justify a policy favoring the results of arbitration proceedings all occurred prior to the passage of HRS 519-2(1975) which mandates arbitration of lease rents by law. The policy referred to by Respondents is founded on the concept that arbitration was voluntary, mutual and private. The subject arbitration was mandatory under State law, invoked by one party(Kalama) and conducted by a single arbitrator whose decision is devoid of findings of fact or conclusions. In addition HRS-519 provides a multi-faceted formula for arbitrators to follow in setting lease rents. The only available authority to determine whether the arbitrator followed the law, and check and balance abuses if he did not, is the court. Other courts have recognized this need rather incisively.(See Corpus Juris Secondum 6,154,p-412)

> " A mistake or error of law or fact which is so gross and palpable as to be evidence of misconduct or undue partial-

ity may however be a ground for impeachment as may be a misconception of law which is so perverse as to work manifest injustice." Matter of Wilkens, 169 NY 9462

Other courts have solidified the holding that an award may be set aside if error of law is so substantial that, but for it, the award would have been substantially different(St. Barnard v. Detroit Auto Insurance Exchange, 350 NW 2d 84; Taylor v. Fitz Coal Co. 618 SW2d 432;Beaufort Concrete Co. v. Atlantic States Const. Co. 352 F2d 460; Jacob v. Pacific Export & Lumber Co., 297 P 848, and Northern States Const. Co v. Bandero, 346 P2d 625.)

Petitioner's submit that a violation of their constitutional rights by impairment of existing contracts is a gross error and misconception of law perversely worked on them by a State designated arbitrator under State law. The result has saddled them with a manifest constitutional injustice, which if left intact, will continue to oppress

their pursuit of a happy domicile for the remainder of their lease terms(some 21-26 years) and possibly longer. Such a basic injustice commands review by the Supreme Court.

Dated this 4TH day of MAY, 1989

Donald A. Bremner

Donald A, Bremner, pro se
348 Dune Circle
Kailua, Hawaii 96734

Dorothy G. Bremner

Dorothy G. Bremner
348 Dune Circle
Kailua, Hawaii 96734

HOSPITALIZED AND
UNAVAILABLE

Kathleen M. Fischel
376 N. Kalaheo Ave.
Kailua, Hawaii 96734

Corinne C. Strauser

Corinne C. Strauser
51 Kaumana Pl
Kailua, Hawaii 96734